

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

KATHERINE L. HULEN,	)	
	)	No. CV-07-3092-JPH
Plaintiff,	)	
	)	ORDER GRANTING DEFENDANT'S
v.	)	MOTION FOR SUMMARY JUDGMENT
	)	
MICHAEL J. ASTRUE, Commissioner	)	
of Social Security,	)	
	)	
Defendant.	)	
	)	
	)	

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BEFORE THE COURT are cross-motions for summary judgment noted for hearing without oral argument on April 28, 2008. (Ct. Rec. 14, 17). Attorney D. James Tree represents Plaintiff; Special Assistant United States Attorney L. Jamala Edwards represents the Commissioner of Social Security ("Commissioner"). Plaintiff filed a reply brief on April 28, 2008. (Ct. Rec. 19). The parties have consented to proceed before a magistrate judge. (Ct. Rec. 8.) After reviewing the administrative record and the briefs filed by the parties, the court **GRANTS** Defendant's Motion for Summary Judgment (Ct. Rec. 17) and **DENIES** Plaintiff's Motion for Summary Judgment (Ct. Rec. 14.)

**JURISDICTION**

Plaintiff protectively filed an application for Supplemental

1 Security Income (SSI) benefits on May 24, 2005, alleging an onset  
2 date of August 15, 1996. (Tr. 37-40). The application was  
3 denied initially and on reconsideration. (Tr. 21, 22-25.)  
4 Administrative Law Judge ("ALJ") Peter J. Baum held a hearing on  
5 October 17, 2006. (Tr. 121-135). On April 12, 2007, the ALJ  
6 issued a decision finding that plaintiff was not disabled. (Tr.  
7 14-19.) The Appeals Council denied a request for review on  
8 September 25, 2007. (Tr. 3-5). Therefore, the ALJ's decision  
9 became the final decision of the Commissioner, which is appealable  
10 to the district court pursuant to 42 U.S.C. § 405(g). Plaintiff  
11 filed this action for judicial review pursuant to 42 U.S.C. §  
12 405(g) on October 15, 2007. (Ct. Rec. 4).

#### 13 **STATEMENT OF FACTS**

14 The facts have been presented in the administrative hearing  
15 transcripts, the ALJ's decisions, the briefs of both Plaintiff and  
16 the Commissioner, and will only be summarized here.

17 Plaintiff was 52 years old on the date of the hearing. (Tr.  
18 124.) She earned a high school diploma. (Tr. 125.) Plaintiff  
19 worked installing heating and air conditioning units. (Tr. 63,  
20 125.) Plaintiff testified she has problems for the past three  
21 years with her legs and feet, sharp back pain, and ringing in her  
22 ears. (Tr. 126-134.)

#### 23 **SEQUENTIAL EVALUATION PROCESS**

24 The Social Security Act (the "Act") defines "disability" as  
25 the "inability to engage in any substantial gainful activity by  
26 reason of any medically determinable physical or mental impairment  
27 which can be expected to result in death or which has lasted or  
28 can be expected to last for a continuous period of not less than

1 twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The  
2 Act also provides that a Plaintiff shall be determined to be under  
3 a disability only if any impairments are of such severity that a  
4 Plaintiff is not only unable to do previous work but cannot,  
5 considering Plaintiff's age, education and work experiences,  
6 engage in any other substantial gainful work which exists in the  
7 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).  
8 Thus, the definition of disability consists of both medical and  
9 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156  
10 (9<sup>th</sup> Cir. 2001).

11 The Commissioner has established a five-step sequential  
12 evaluation process for determining whether a person is disabled.  
13 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person  
14 is engaged in substantial gainful activities. If so, benefits are  
15 denied. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). If  
16 not, the decision maker proceeds to step two, which determines  
17 whether Plaintiff has a medically severe impairment or combination  
18 of impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii),  
19 416.920(a)(4)(ii).

20 If Plaintiff does not have a severe impairment or combination  
21 of impairments, the disability claim is denied. If the impairment  
22 is severe, the evaluation proceeds to the third step, which  
23 compares Plaintiff's impairment with a number of listed  
24 impairments acknowledged by the Commissioner to be so severe as to  
25 preclude substantial gainful activity. 20 C.F.R. §§  
26 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P  
27 App. 1. If the impairment meets or equals one of the listed  
28 impairments, Plaintiff is conclusively presumed to be disabled.

1 If the impairment is not one conclusively presumed to be  
2 disabling, the evaluation proceeds to the fourth step, which  
3 determines whether the impairment prevents Plaintiff from  
4 performing work which was performed in the past. If a Plaintiff  
5 is able to perform previous work, that Plaintiff is deemed not  
6 disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv).  
7 At this step, Plaintiff's residual functional capacity ("RFC")  
8 assessment is considered. If Plaintiff cannot perform this work,  
9 the fifth and final step in the process determines whether  
10 Plaintiff is able to perform other work in the national economy in  
11 view of Plaintiff's residual functional capacity, age, education  
12 and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),  
13 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

14 The initial burden of proof rests upon Plaintiff to establish  
15 a *prima facie* case of entitlement to disability benefits.  
16 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9<sup>th</sup> Cir. 1971); *Meanel v.*  
17 *Apfel*, 172 F.3d 1111, 1113 (9<sup>th</sup> Cir. 1999). The initial burden is  
18 met once Plaintiff establishes that a physical or mental  
19 impairment prevents the performance of previous work. The burden  
20 then shifts, at step five, to the Commissioner to show that (1)  
21 Plaintiff can perform other substantial gainful activity and (2) a  
22 "significant number of jobs exist in the national economy" which  
23 Plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9<sup>th</sup>  
24 Cir. 1984).

#### 25 STANDARD OF REVIEW

26 Congress has provided a limited scope of judicial review of a  
27 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold  
28 the Commissioner's decision, made through an ALJ, when the

1 determination is not based on legal error and is supported by  
2 substantial evidence. *See Jones v. Heckler*, 760 F.2d 993, 995  
3 (9<sup>th</sup> Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9<sup>th</sup> Cir.  
4 1999). "The [Commissioner's] determination that a plaintiff is  
5 not disabled will be upheld if the findings of fact are supported  
6 by substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572  
7 (9<sup>th</sup> Cir. 1983) (*citing* 42 U.S.C. § 405(g)). Substantial evidence  
8 is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d  
9 1112, 1119 n. 10 (9<sup>th</sup> Cir. 1975), but less than a preponderance.  
10 *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9<sup>th</sup> Cir. 1989);  
11 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d  
12 573, 576 (9<sup>th</sup> Cir. 1988). Substantial evidence "means such  
13 evidence as a reasonable mind might accept as adequate to support  
14 a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)  
15 (citations omitted). "[S]uch inferences and conclusions as the  
16 [Commissioner] may reasonably draw from the evidence" will also be  
17 upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9<sup>th</sup> Cir. 1965).  
18 On review, the Court considers the record as a whole, not just the  
19 evidence supporting the decision of the Commissioner. *Weetman v.*  
20 *Sullivan*, 877 F.2d 20, 22 (9<sup>th</sup> Cir. 1989) (*quoting Kornock v.*  
21 *Harris*, 648 F.2d 525, 526 (9<sup>th</sup> Cir. 1980)).

22       It is the role of the trier of fact, not this Court, to  
23 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If  
24 evidence supports more than one rational interpretation, the Court  
25 may not substitute its judgment for that of the Commissioner.  
26 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579  
27 (9<sup>th</sup> Cir. 1984). Nevertheless, a decision supported by  
28 substantial evidence will still be set aside if the proper legal

standards were not applied in weighing the evidence and making the decision. *Browner v. Secretary of Health and Human Services*, 839 F.2d 432, 433 (9<sup>th</sup> Cir. 1987). Thus, if there is substantial evidence to support the administrative findings, or if there is conflicting evidence that will support a finding of either disability or nondisability, the finding of the Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9<sup>th</sup> Cir. 1987).

#### ALJ'S FINDINGS

The ALJ found at step one that plaintiff has not engaged in substantial gainful activity since her onset date of August 15, 1996, nor since her protective filing date of May 24, 2005. (Tr. 14-15). At steps two and three, the ALJ found that plaintiff suffered from tinnitus and lumbar spondylosis with chronic back pain, impairments that are severe but which do not alone or combination meet or medically equal a Listing impairment. (Tr. 15-16). At step four, the ALJ found that plaintiff was unable to perform her past relevant work. (Tr. 18). The ALJ found that transferability of job skills is not material. (Tr. 18.) At step five of the sequential evaluation process, the ALJ used the Medical-Vocational Rules as a framework which supported finding that the plaintiff could perform other work that exists in significant numbers in the national economy. (Tr. 18-19). Accordingly, the ALJ found that plaintiff was not disabled within the meaning of the Social Security Act. (Tr. 19).

#### ISSUES

Plaintiff contends that the Commissioner erred as a matter of law. Specifically, she argues that the ALJ improperly rejected

1 her subjective complaints; failed to fully and fairly develop the  
2 record, and, because her non-exertional impairments are  
3 significant, the ALJ was required to rely on a vocational expert's  
4 testimony rather than the Medical-Vocational Guidelines (Grids) at  
5 step five. (Ct. Rec. 15 at 7-11).

6 The Commissioner opposes the Plaintiff's motion for summary  
7 judgment and asks that the ALJ's decision be affirmed. (Ct. Rec.  
8 18 at 5-10).

## 9 DISCUSSION

### 10 A. Credibility

11 In social security proceedings, the claimant must prove the  
12 existence of a physical or mental impairment by providing medical  
13 evidence consisting of signs, symptoms, and laboratory findings;  
14 the claimant's own statement of symptoms alone will not suffice.  
15 20 C.F.R. § 416.908. The effects of all symptoms must be evaluated  
16 on the basis of a medically determinable impairment which can be  
17 shown to be the cause of the symptoms. 20 C.F.R. § 416.929. Once  
18 medical evidence of an underlying impairment has been shown,  
19 medical findings are not required to support the alleged severity  
20 of symptoms. *Bunnell v. Sullivan*, 947, F. 2d 341, 345 (9<sup>th</sup> Cr.  
21 1991).

22 A treating or examining physician's opinion is given more  
23 weight than that of a non-examining physician. *Benecke v.*  
24 *Barnhart*, 379 F. 3d 587, 592 (9<sup>th</sup> Cir. 2004). If the treating or  
25 examining physician's opinions are not contradicted, they can be  
26 rejected only with clear and convincing reasons. *Lester v. Chater*,  
27 81 F. 3d 821, 830 (9<sup>th</sup> Cir. 1996). If contradicted, the ALJ may  
28 reject an opinion if he states specific, legitimate reasons that

1 are supported by substantial evidence. See *Flaten v. Secretary of*  
2 *Health and Human Serv.*, 44 F. 3d 1453, 1463 (9<sup>th</sup> Cir. 1995). In  
3 addition to medical reports in the record, the analysis and  
4 opinion of a non-examining medical expert selected by an ALJ may  
5 be helpful to the adjudication. *Andrews v. Shalala*, 53 F. 3d 1035,  
6 1041 (9<sup>th</sup> Cir. 1995) (*citing Magallanes v. Bowen*, 881 F. 2d 747,  
7 753 (9<sup>th</sup> Cir. 1989)). Testimony of a medical expert may serve as  
8 substantial evidence when supported by other evidence in the  
9 record. *Id.*

10 Plaintiff alleges that the ALJ erred when he rejected her  
11 subjective complaints. (Ct. Rec. 15 at 8-9.) The Commissioner  
12 responds that the ALJ's credibility assessment is based on clear  
13 and convincing reasons and supported by the record. (Ct. Rec. 18  
14 at 6-9.)

15 The ALJ relied on several factors when assessing plaintiff's  
16 credibility: (1) subjective complaints and alleged limitations are  
17 "out of proportion" to objective clinical findings and observed  
18 functional restrictions; (2) plaintiff takes no medication, other  
19 than over the counter medication; (3) plaintiff has not sought  
20 treatment for back pain; (4) plaintiff exhibited inconsistencies  
21 and positive Waddell's signs during examination, and (5)  
22 plaintiff's activities are inconsistent with the degree of  
23 impairment alleged. (Tr. 17-18.)

24 Plaintiff explains her failure to seek medical treatment  
25 during any time at issue is due to a lack of funds and insurance.  
26 (Tr. 78.) While the lack of funds for medical care is not a clear  
27 and convincing reason for an adverse credibility finding, the  
28 ALJ's other reasons are clear and convincing.



1 The ALJ notes that in pre-hearing statements, plaintiff  
2 reported diabetes, hearing loss, chronic back pain and pain in the  
3 legs, feet, and shoulders have caused difficulties sleeping,  
4 lifting, squatting, bending, standing, reaching, walking, sitting,  
5 kneeling, talking, hearing, stair climbing, seeing, remembering,  
6 completing tasks, concentrating, understanding, following  
7 instructions and using her hands. (Tr. 17, referring to Tr. 60.)  
8 The ALJ notes plaintiff reported an inability to see, which  
9 affects her ability to handle money and follow written  
10 instructions. (Tr. 17.)

11 The ALJ notes that plaintiff's family has a history of  
12 diabetes, but there is no medical evidence that plaintiff has  
13 diabetes. Plaintiff admitted she had a diagnosis of borderline  
14 diabetes when pregnant in 1980, the ALJ observes, but her blood  
15 sugar levels returned to normal after delivery. Plaintiff takes  
16 no medication for diabetes and has not had blood sugars tested  
17 since the 1980's. (Tr. 17.) This is a clear and convincing  
18 reason, supported by the record, for the ALJ's finding that  
19 plaintiff is less than fully credible.

20 Similarly, plaintiff alleges hearing loss. (Tr. 59, 74.) The  
21 ALJ points out that the evaluating otolaryngologist and  
22 audiologist found no evidence of hearing loss. (Tr. 17, referring  
23 to Tr. 99.) Despite plaintiff's claimed severe limitations and  
24 constant pain, the ALJ notes that she takes no prescribed  
25 medication. (Tr. 108.)

26 Marie Ho, M.D., examined and evaluated plaintiff on June 25,  
27 2005. (Tr. 107-113.) The ALJ notes Dr. Ho observed some  
28 inconsistency in plaintiff's physical examination as well as

1 positive Waddell's sign. (Tr. 18, referring to Tr. 108, 110.)

2 The ALJ relies on the inconsistencies between plaintiff's  
3 daily activities and the degree of claimed impairment:

4 Indeed, while claiming difficulty following written  
5 instructions due to unsupported sight difficulties,  
6 the claimant reported that she can follow spoken  
7 instructions 'well' despite allegations of hearing  
8 loss. Moreover, the claimant acknowledged that she  
9 spends time on the phone with family members and her  
10 hobby/interest is watching and listening to television  
(Exhibit 1-E:18-19). . .

11 The claimant acknowledges that she is able to do her  
12 own personal care, shops, cooks and does the housework.  
13 Her hobby is sewing (Exhibit 1-F:19), which would  
14 compromise her hand problems.

15 (Tr. 17-18.)

16 The ALJ weighed the scant medical evidence. To aid him in  
17 this process, he evaluated plaintiff's credibility. (Tr. 17-18.)  
18 Credibility determinations bear on evaluations of medical evidence  
19 when an ALJ is presented with conflicting medical opinions or  
20 inconsistency between a claimant's subjective complaints and  
21 diagnosed condition. See *Webb v. Barnhart*, 433 F. 3d 683, 688  
22 (9<sup>th</sup> Cir. 2005).

23 The ALJ gave clear and convincing reasons for finding  
24 plaintiff less than completely credible. His reasons are  
25 supported by the record.

## 26 **B. Duty to Develop the Record**

27 Plaintiff contends that the ALJ failed to fulfill his duty to  
28 fully and fairly develop the record. (Ct. Rec. 15 at 7-8.) The  
Commissioner responds that the ALJ's duty to further develop the  
record is triggered when the evidence is ambiguous or the record  
is inadequate to properly evaluate the evidence, and neither  
applies. (Ct. Rec. 18 at 6.)

"In Social Security cases the ALJ has a special duty to fully

1 and fairly develop the record and to assure that the claimant's  
2 interests are considered." *Webb*, 433 F. 3d at 687, *citing Brown*  
3 *v. Heckler*, 713 F. 2d 441, 443 (9<sup>th</sup> Cir. 1983) (per curiam). The  
4 ALJ's duty to further develop the record is triggered by ambiguous  
5 evidence or a record inadequate for proper evaluation. *Tonapetyan*  
6 *v. Hatler*, 242 F. 3d 1144, 1150 (9<sup>th</sup> Cir. 2001).

7 The ALJ considered audiology testing as well as the opinion  
8 of examining physician Dr. Ho, who opined plaintiff could sit,  
9 stand, or walk 6 hours out of 8, lift ten pounds frequently and 20  
10 occasionally, and occasionally kneel and crouch. (Tr. 111.) Dr.  
11 Ho noted that plaintiff's strength, sensation and reflexes were  
12 all normal. (Tr. 110.) The ALJ considered the lumbar x-rays in  
13 June of 2005 showing mild degenerative disc disease at L3-4,  
14 moderate degenerative disc change at L4-5 and moderate facet  
15 arthrosis at L5-S1, which Dr. Ho reviewed and opined did not  
16 change her assessment of plaintiff's RFC. (Tr. 114-115.)

17 The ALJ eventually found plaintiff met her burden through  
18 step four of the sequential evaluation process. At step four, he  
19 found that plaintiff could no longer perform her past relevant  
20 work. While a step four finding is not dispositive of the ALJ's  
21 duty to develop the record, given plaintiff's lack of treatment  
22 over many years, the ALJ's duty to fully and fairly complete the  
23 record appears to have been met in this case.

#### 24 **C. Step Five**

25 Plaintiff contends the ALJ improperly relied on the Grids  
26 rather than a VE at step five. (Ct. Rec. 15 at 9-11.) The  
27 Commissioner responds that because plaintiff's non-exertional  
28 impairments did not significantly erode the base of light jobs  
available, the ALJ was not required to rely on the testimony of a

1 VE at step five. (Ct. Rec. 18 at 9-10.)

2 The Commissioner correctly points out that plaintiff's only  
3 non-exertional limitations include occasional kneeling and  
4 crouching, and avoiding moderate exposure to noise. (Ct. Rec. 18  
5 at 9, referring to Tr. 16.) The ALJ found that, other than these  
6 limitations, the plaintiff could perform unskilled light work; the  
7 additional limitations have "little or no effect on the  
8 occupational base of unskilled light work." (Tr. 16, 18-19.)  
9 Plaintiff acknowledges that application of the Grids is  
10 inappropriate where a claimant's work capacity is significantly  
11 diminished beyond that caused by an exertional impairment (Ct.  
12 Rec. 15 at 10, citing *Bapp v. Bowen*, 802 F. 2d 601, 605-606 (2<sup>nd</sup>  
13 Cir. 1986); because plaintiff's additional limitations have little  
14 or no effect on the occupational base of unskilled light work,  
15 the ALJ appropriately relied on the framework of Medical-  
16 Vocational Rule 202.14 to find that she not disabled.

#### 17 CONCLUSION

18 Having reviewed the record and the ALJ's conclusions, this  
19 court finds that the ALJ properly assessed plaintiff's subjective  
20 complaints; that the ALJ fulfilled his duty to fully and fairly  
21 develop the record, and that the ALJ's decision at step five that  
22 the Grids apply because plaintiff's non-exertional impairments do  
23 not significantly erode the base of available jobs at the light  
24 level of exertion is free of error and supported by substantial  
25 evidence.

#### 26 IT IS ORDERED:

27 1. Defendant's Motion for Summary Judgment (Ct. Rec. 17) is  
28 GRANTED.

2. Plaintiff's Motion for Summary Judgment (Ct. Rec. 14) is

1 **DENIED.**

2       The District Court Executive is directed to file this Order,  
3 provide copies to counsel for Plaintiff and Defendant, enter  
4 judgment in favor of Defendant, and **CLOSE** this file.

5       DATED this 28th day of May, 2008.

6                               /s/ James P. Hutton

7                               JAMES P. HUTTON  
8                               UNITED STATES MAGISTRATE JUDGE